

N.Y.S.D. Case #  
14-cv-8379(PAC)

15-3003

Tacopina v. O'Keefe et al.

**MANDATE**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29<sup>th</sup> day of March, two thousand sixteen.

PRESENT: DENNIS JACOBS,  
PETER W. HALL,  
Circuit Judges.  
DENISE COTE,\*  
District Judge.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: May 02, 2016

JOSEPH TACOPINA,  
Plaintiff-Appellant,

-v.-

15-3003

MICHAEL O'KEEFFE, DAILY NEWS L.P., &  
TIMOTHY C. PARLATORE,  
Defendants-Appellees.

\* The Honorable Denise Cote, United States District Court for the Southern District of New York, sitting by designation.

1     **FOR APPELLANT:**                     JUDD BURSTEIN, JUDD BURSTEIN  
2                                     P.C., New York, New York.

3  
4     **FOR APPELLEE**

5     **MICHAEL O'KEEFFE:**                 MATTHEW A. LEISH, ASSISTANT  
6                                     GENERAL COUNSEL, DAILY NEWS,  
7                                     L.P., New York, New York.

8     **FOR APPELLEE**

9     **TIMOTHY C. PARLATORE:**           TIMOTHY C. PARLATORE, PRO SE,  
10                                     New York, New York.

11  
12     Appeal from a judgment of the United States District  
13     Court for the Southern District of New York (Crotty, J.).  
14

15     **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
16     **AND DECREED** that the judgment of the district court be  
17     **AFFIRMED.**

18  
19     Joseph Tacopina appeals from the judgment of the United  
20     States District Court for the Southern District of New York  
21     (Crotty, J.) dismissing his claims for defamation and abuse  
22     of process. We assume the parties' familiarity with the  
23     underlying facts, the procedural history, and the issues  
24     presented for review.

25  
26     1. Tacopina's defamation claim against Parlatores is  
27     premised on statements made in an affidavit Parlatores filed  
28     in court on behalf of a client. These statements are  
29     therefore privileged and cannot form the basis for a  
30     defamation claim. See Front, Inc. v. Khalil, 28 N.E.3d 15,  
31     24 N.Y.3d 713, 718-20 (N.Y. 2015) ("[I]t is well-settled  
32     that statements made in the course of litigation are  
33     entitled to absolute privilege . . . we hold that statements  
34     made prior to the commencement of an anticipated litigation  
35     are privileged, and that the privilege is lost where a  
36     defendant proves that the statements were not pertinent to a  
37     good faith anticipated litigation."). Even crediting  
38     Tacopina's allegation that Parlatores shared the affidavit  
39     with the Daily News before filing it in court, Tacopina has  
40     still not sustained his burden of showing that the  
41     statements were not pertinent to a good faith anticipated  
42     litigation. Given Tacopina's allegation that Parlatores  
43     tendered a carbon copy of the affidavit to the Daily News,  
44     such an argument is meritless.

2. As to Tacopina's defamation claims against the Daily News, New York Civil Rights Law § 74 ("fair reporting privilege") prohibits civil actions "against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." "A publication is deemed 'fair and true' if it is 'substantially accurate.'" Karedes v. Ackerley Grp. Inc., 423 F.3d 107, 119 (2d Cir. 2005) (quoting Glendora v. Gannett Suburban Newspapers, 201 A.D. 2d 620, 608 N.Y.S.2d 239, 240 (App. Div. 1994)). "'A report is 'substantially accurate' if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth.'" Id. (quoting Zerman v. Sullivan & Cromwell, 677 F. Supp. 1316, 1322 (S.D.N.Y. 1988)). In applying the fair reporting privilege, "newspaper accounts of legislative or other official proceedings must be accorded some degree of liberality." Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co., 399 N.E.2d 1185, 1187 (N.Y. 1979). "When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author." Id.

We conclude that the fair reporting privilege bars Tacopina's defamation claims against the Daily News. Although the October 15 Article misattributed the source of the cocaine allegations, this inaccuracy would not have impacted the effect on readers; it is unlikely that the fact that two former clients, instead of one, alleged that Tacopina abused drugs would have impacted the esteem in which Tacopina was held by the public. The Editor's Note to the October 15 Article is similarly shielded by the fair reporting privilege; it corrects the source of the cocaine allegations and the Article repeats verbatim what Parlatore proffered in the Jane Doe affirmation: that Tacopina had "come under public scrutiny" for cocaine allegations. Joint Appendix at 189. The same conclusion follows for the October 17 Article; the inaccuracies in the Article would not have meaningfully impacted reader perception, and stemmed simply from an inability to perfectly comprehend

1 legalese. "Newspapers cannot be held to a standard of  
 2 strict accountability for use of legal terms of art in a way  
 3 that is not precisely or technically correct by every  
 4 possible definition." Becher v. Troy Publ'g Co., Inc., 183  
 5 A.D.2d 230, 234 (N.Y. App. Div. 1992) (quoting Gurda v.  
 6 Orange Cnty. Publ'ns. Div. of Ottaway Newspapers, 81 A.D.2d  
 7 120, 133 (N.Y. App. Div. 1981)).

8  
 9 3. Tacopina argues that his abuse of process claim was  
 10 improperly dismissed. The district court dismissed this  
 11 claim for two reasons: (1) failure to plead special damages;  
 12 and (2) failure to plead that process was abused in a  
 13 perverted manner to obtain a collateral objective. Tacopina  
 14 challenges only the first of these holdings in his main  
 15 brief; his failure to contest the second holding waives this  
 16 point. See JP Morgan Chase Bank v. Altos Hornos de Mexico,  
 17 S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) ("We begin by  
 18 observing that arguments not made in an appellant's opening  
 19 brief are waived even if the appellant pursued these  
 20 arguments in the district court or raised them in a reply  
 21 brief."). The district court's dismissal of the abuse of  
 22 process claim is affirmed.

23  
 24 For the foregoing reasons, and finding no merit in  
 25 Tacopina's other arguments, we hereby **AFFIRM** the judgment of  
 26 the district court.

27  
 28 FOR THE COURT:  
 29 CATHERINE O'HAGAN WOLFE, CLERK  
 30

Catherine O'Hagan Wolfe



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe

